



Brian Sandoval
Governor

Barbara Smith Campbell
Chairwoman

Jon M. Hager
Executive Director

Silver State Health Insurance Exchange

2310 S. Carson Street, Suite 2, Carson City, NV 89701 • T: 775-687-9939 F: 775-687-9932
exchange.nv.gov

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Centers for Medicare and Medicaid Services
Department of Health and Human Services
Attention: CMS 9958-P
Mail Stop C4-26-05
7500 Security Boulevard
Baltimore, Maryland 21244-1850

Re: CMS 9958-P, Patient Protection and Affordable Care Act; Exchange Functions: Eligibility for Exemptions; Miscellaneous Minimum Essential Coverage Provisions; Proposed Rule

Dear Administrator Tavenner:

The Silver State Exchange appreciates the opportunity to comment on proposed rule CMS-9958-P published in the Federal Register on February 1, 2013 on applications for certificates of exemption from shared responsibility tax penalties, appeal rights, reporting requirements, and health benefits outside the Exchange that would meet minimum essential coverage requirements. The proposed rule pertains to sections 1311, 1321, 1411, and 1501 of the Affordable Care Act (ACA).

The proposed rule would require that the Exchange determine eligibility for certificates of exemption based on five exemption categories: religious conscience, hardship, membership in an Indian tribe, membership in a health care sharing ministry, and incarceration. It would also require that the Exchange use CMS approved forms for that purpose, verify exemption application data, resolve inconsistencies or errors in such data before approving or denying exemptions, notify applicants of appeal rights on exemption denials, and report exemption certificate data to the IRS. We feel that many responsibilities outlined in this rule should be the responsibility of the IRS and not the Exchange. To that end we provide the following comments.

45 CFR § 155.605 ELIGIBILITY STANDARDS FOR EXEMPTIONS

The proposed rule states that the Exchange must determine an applicant eligible for and issue a certification of exemption based on religious conscience, hardship, membership in an Indian tribe, membership in a health care sharing ministry, and incarceration. The proposed rule addresses whether the Exchange must effectuate such exemptions prospectively, retrospectively, or both.

We believe that the purpose of giving an individual an opportunity to obtain a certificate of exemption prospectively through the Exchange is so that they can find out contemporaneously, when they are making their health insurance purchasing decision, whether or not they would face a tax penalty next year if they do not obtain coverage. If the individual does not avail himself of that opportunity, he could apply for an exemption from the IRS later as part of the tax filing process.

The proposed rule addresses prospective and retrospective determinations by the Exchange as follows:

1. 45 CFR § 155.605(c)(3) states that exemptions based on religious conscience will be determined both prospectively and retrospectively.
2. 45 CFR § 155.605(g) does not state explicitly which of the five subcategories of hardship under 45 CFR 155.605(g)(1)-(5) will be determined both prospectively and retrospectively, but subcategory (1) appears to be retrospective, subcategory (2) appears to be prospective, subcategory (3) appears to be retrospective, and subcategories (4) and (5) could be prospective or retrospective.
3. 45 CFR § 155.605(d)(2) states that membership in a health care sharing ministry will only be determined retrospectively.
4. 45 CFR § 155.605(e)(2) states that incarceration will only be determined retrospectively.
5. 45 CFR § 155.605(f)(3) states that membership in an Indian tribe will be determined both prospectively and retrospectively.

Section 5000A of the Internal Revenue Code, as amended by the ACA, provides for nine categories of exemptions. Four of those will not be the responsibility of the Exchange and will only be determined by the IRS retrospectively as part of the tax filing process.

Section 5000A requires that exemptions based on religious conscience and hardship be determined through the Exchange. Section 5000A does not require that exemptions based on membership in an Indian tribe, membership in a health care sharing ministry, or incarceration be determined through the Exchange, but the proposed rule would provide for that.

We recommend that the proposed rule allow the Exchange to decide, as a matter of Exchange policy, whether it will determine eligibility for certificates of exemption for membership in a health care sharing ministry and for incarceration. Our recommendation is based on two considerations:

1. Section 5000A does not require the Exchange to determine eligibility for certificates of exemption in those two categories, and;

2. Individuals in those two categories would only qualify under the proposed rule for retrospective exemptions, which they can obtain retrospectively from the IRS anyway, as part of the regular tax filing process. Thus, it is unclear to us exactly what individuals would have to gain by separately obtaining those two exemptions retrospectively through the Exchange, or that the Exchange's administrative burden and expenses in separately administering those two exemptions would be justified.

In addition to the larger concepts discussed above, we have the following comments regarding the specific exemption requirements.

45 CFR § 155.605(b) does not allow the duration of an exemption to exceed a calendar year. The administration of exemptions is expected to be burdensome and costly. We recommend allowing the Exchange to determine the length of an exemption. For instance, a person affected by a natural disaster may be immediately impacted by the occurrence itself or may be affected for a longer span of time. Additionally, we would appreciate the flexibility to be able to issue a single exemption for a situation that only lasted a few months but spans the new year; for instance, an event that lasts from November 2014 through February 2015.

45 CFR § 155.605(c)(2)(i) requires the Exchange grant a religious conscience exemption to those under age 18. However, it is questionable whether an individual under age 18 could legally attest to being a member of an applicable religious sect or division.

45 CFR § 155.605(c)(2)(ii) requires the Exchange contact an individual who previously received a religious conscience exemption when they turn 18. Seeking such an exemption should be the responsibility of the individual, not the Exchange. Therefore, we recommend striking paragraph (ii) in its entirety.

The preamble indicates that exemptions due to hardship be issued prospectively to allow an individual to include that information in their purchasing decision. However, 45 CFR § 155.605(f)(3) requires the Exchange issue tribal exemptions prospectively or retrospectively. We agree that tribal members should be provided the information appropriate to make insurance selection decisions. However, we do not feel it is necessary that an Exchange provide such an exemption as it is not required by the ACA and the information provided to the Exchange to provide such an exemption could be kept on file with the individual's taxes; such an exemption should be made by the IRS. However, if the Exchange is required to make such an exemption, we recommend that it be prospective only, for the same reasons described above. Requiring the Exchange to administer exemptions for a relationship between the tax payer and the IRS is neither efficient nor appropriate.

45 CFR § 155.605(g)(3) requires an Exchange issue an exemption if an individual is not required to file a tax return. An exemption should not be necessary if an individual is not required to file a tax return. Therefore, we recommend striking paragraph (3) in its entirety.

45 CFR § 155.610 ELIGIBILITY PROCESS FOR EXEMPTIONS

45 CFR § 155.610(e)(2) prohibits the Exchange from collecting a Social Security number (SSN) from an individual who is not seeking an exemption. This language is overly broad and could be construed to prohibit the Exchange from collecting the appropriate SSN from those who enroll in a QHP. As such, we recommend the language be modified to state, “The Exchange may not require an individual who is not seeking an exemption for himself or herself *and who is not enrolling in a QHP through the Exchange* to provide a Social Security number, except as specified in paragraph (e)(3) of this section.”

The proposed rule deals primarily with Exchange responsibilities in the eligibility process for exemptions. However, 45 CFR 155.610 (j)(1) and (2) pertain to the individual’s retention of records for tax compliance purposes, including the individual’s receipt of the certificate of exemption from the Exchange and the individual’s personal documentation supporting the exemption.

We recommend that 45 CFR 155.610 (j)(1) and (2) be deleted. The individual’s responsibility to retain evidence of his receipt of the certificate of exemption and his personal documentation supporting the exemption, while important for tax purposes, should be addressed exclusively in IRS rules. That responsibility should rest squarely on the taxpayer, not the Exchange.

Electronic information concerning certificate issuance will be available at the Exchange and at the IRS. The Exchange will not want to retain taxpayers’ personal documentation supporting exemptions for long periods (as IRS audit rules require taxpayers to do).

45 CFR § 155.615 VERIFICATION PROCESS RELATED TO ELIGIBILITY FOR EXEMPTIONS

45 CFR § 155.615(b)(2) would allow the Exchange to accept an attestation that the applicant is a member of a religious group, where the Exchange verifies the status of the religious group with the Social Security Administration. Similarly, 45 CFR 155.615(c)(1) would allow the Exchange to accept an attestation that an applicant is a member of a health care sharing ministry, where the Exchange verifies the status of the ministry with HHS. The term attestation is not clearly defined in the proposed rule (e.g., it is unclear in the proposed rule whether the attestation is to be signed by the applicant under penalties of perjury, IRS tax fraud, etc.).

We recommend that the rule state that the attestation will be provided in a form acceptable to the Exchange, at the Exchange’s discretion, or that the attestation will be provided in a specific format to be defined by HHS and/or the IRS.

45 CFR § 155.615(c)(3) indicates the Exchange must notify HHS if the Exchange does not know of the health care sharing ministry and that HHS will notify the Exchange regarding the attested health care sharing ministry’s status. During such time, the Exchange shall not determine an applicant eligible or ineligible. We recommend that it is clarified that eligibility or ineligibility

pertains to an exemption and not eligibility for coverage under a QHP through the Exchange. Furthermore, we recommend that if an Exchange cannot determine the status of a health care sharing ministry, that HHS issue the exemption or notice of ineligibility for the exemption.

45 CFR § 155.615(h) further provides that the Exchange *must* provide an exception under special circumstances, on a case-by-case basis, to accept an applicant's attestation as to the information which cannot otherwise be verified along with an explanation of circumstances as to why the applicant does not have the documentation. It is not clear whether the attestation applies only to the information which cannot otherwise be verified, or whether the attestation applies also to the explanation of circumstances as to why the applicant does not have the supporting documentation.

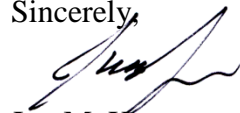
We recommend that the rule state instead that the Exchange *may* at its discretion provide an exception under special circumstances, on a case-by-case basis, to accept an applicant's attestation as to: (1) the information which cannot otherwise be verified; and (2) why supporting documentation is not available.

45 CDR § 155.630 REPORTING

To our knowledge, no interface for reporting of exemptions has yet been established by the IRS to report exemptions. We request that Exchanges be provided sufficient time to implement such an interface.

We appreciate the opportunity to offer these comments and look forward to working with you further on these and other health insurance exchange implementation activities.
Thank you very much for considering our input.

Sincerely,



Jon M. Hager
Director, Silver State Health Insurance Exchange

cc: Jackie Bryant, Deputy Chief of Staff, Office of the Governor
Mike Willden, Director, Department of Health and Human Services
Scott Kipper, Commissioner of Insurance, Division of Insurance
Gary Cohen, Director, Center for Consumer Information and Insurance Oversight
Amanda Cowley, Director, State Health Exchanges, Center for Consumer Information
and Insurance Oversight